

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 347  
3217339

	BETWEEN	TERTIARY EDUCATION UNION First Applicant
	AND	HUHANA WATENE Second Applicant
	AND	PRABHAT CHAND Third Applicant
	AND	WEI LOO Fourth Applicant
	AND	TE PŪKENGA, NEW ZEALAND INSTITUTE OF SKILLS AND TECHNOLOGY T/A UNITEC. Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Peter Cranney, counsel for the Applicant Sherridan Cook and Sarah Lim, counsel for the Respondent	
Investigation Meeting:	29 April to 2 May 2024 in Auckland	
Submissions and/or further evidence	2 May 2024 from the Applicant and from the Respondent	
Determination:	12 June 2024	

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, the Tertiary Education Union (the TEU), claims that the terms and conditions of its members at Unitec Institute of Technology (Unitec) prior to the transfer to Te Pūkenga, included free car-parking and access to Income Protection and Life Insurance entitlements and that these terms are binding upon the Respondent, New Zealand Institute of Skills and Technology t/a Unitec. (Te Pūkenga).

[2] Te Pūkenga denies that the provision of free car-parking was a term and condition of employment. It claims that the availability of free carparking for staff was only incidental to the employment relationship.

[3] Te Pūkenga also denies that the provision of income protection and life insurance policies benefits were terms and conditions of employment and claims that they were discretionary benefits which it was entitled to withdraw.

### **The Authority's investigation**

[4] The Authority received written and, under oath or affirmation, oral evidence from the Applicants' witnesses, Huhana Watene, academic and Co Vice-President of the Unitec branch of the TEU; Prabhat Chand, academic and Co Vice-President of the Unitec branch of the TEU; and Dr Wei Loo, President of the Unitec Branch of the TEU.

[5] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Gus Gilmore, Jo Adlam, and Sam Lotu-Liga.

[6] The witness evidence was taken on 29 and 30 April 2024, and submissions were presented in person on 2 May 2024.

[7] Oral and written submissions were received from Mr Cranney for the Applicant and from Mr Cook for the Respondent. I have not referred to all the submissions made by the parties, but I have fully considered them.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Issues**

[9] The issues requiring investigation are whether or not:

- Free carparking was a term and condition of employment which Te Pūkenga unlawfully removed?
- The Life and Income Protection Insurances (the policies) terms and conditions were terms of employment which Te Pūkenga unlawfully removed?

## **Background**

[10] Unitec is a tertiary educational establishment offering employment based courses. It has two campuses, one in Mount Albert Auckland, the other in the Waitākere.

[11] Te Pūkenga, a national education institute created by the Education and Training Act 2020, was established on 1 April 2020. The Government's intention in creating Te Pūkenga was to consolidate and centralise all of New Zealand's ITOs (Industry Training Organisations) and ITPs (Institutes of Technology and Polytechnics) including Unitec.

[12] In accordance with Schedule 14 of the Education and Training Act 2020 Te Pūkenga was required to offer employment to all Unitec employees in substantially the same position, and on terms and conditions that were no less favourable than their existing ones. The Education and Training Act 2020 stated at clause 5(2) of Schedule 14:

(2) An employee who is identified under Subclause (1) must be offered equivalent employment by Te Pūkenga – New Zealand Institute of Skills and Technology subsidiary. Being employment that is-

- (a) In substantially the same position; and
- (b) In the same general locality; and
- (c) On terms and conditions (including any terms and conditions relating to superannuation) that are no less favourable than those applying to the employee immediately before the date on which the offer of employment made to the employee; ...

[13] On 29 August 2022 all Unitec employees received a letter offering them an opportunity to transfer to Te Pūkenga in the same capacity, in the same location, and on the same terms and conditions. Dr Loo said that to his knowledge all existing Unitec employees had signed the letter transferring their employment to Te Pūkenga. This was confirmed by Mr Gilmore.

[14] On 1 October 2022 Unitec was dissolved and absorbed into Te Pūkenga with all of Unitec's assets, rights and liabilities being transferred at that date. Accordingly, Te Pūkenga became the employer of all the Unitec employees including Dr Loo, Mr Chand and Ms Watene.

[15] Prior to the transfer date, Dr Loo, who has worked at Unitec since 2005, said Unitec employees had free carparking rights and access to Income Protection and Life Insurance entitlements (the insurances policies).

### *Free Car parking*

[16] Dr Loo, Mr Chand and Ms Watene were all based at the relevant time at the Mount Albert campus.

[17] Dr Loo said he was told about free carparking at his interview. Mr Chand, who had worked at Unitec for over 21 years, said he had similarly been informed about the free carparking at his interview.

[18] Ms Watene, who had worked at Unitec for over 29 years, said upon commencing employment, she had been given a free named carparking space close to the building where she worked. She said there were designated free carparking areas which were for staff use only until mid-February 2023, after which date both staff and students were able to use the free carparking spaces.

[19] Ms Watene stated that if she arrived before 8.00 a.m. on a workday “I almost always got a park”.

[20] Ms Watene said that a reference to free carparking was mentioned in employees’ employment agreements, providing a sample employment agreement dated 14 December 2006 which attached a document titled: “Benefits Available to Unitec Employees’ which stated:

**Parking**

- A large amount of free parking is offered within Unitec’s expansive grounds

[21] Mr Gilmore, CEO of Te Pūkenga, said that Unitec provided free carparking to staff on its Mount Albert campus on a “first come, first served’ basis. This was set out in the staff A-Z which stated:

Free staff parking is available on each campus and you can apply for a parking sticker from Security by logging a request on FM Help - ..  
The free parking is available on a first come, first served basis.

[22] He said carparking was also subject to the Unitec Traffic, Safety and Parking Policy . This included the information that: “Council or the Commissioner may, from time to time, determine parking fees” and set out the parking requirements on the campuses.

*Land sale*

[23] Mr Gilmore explained that in March 2018 Unitec sold some of its land on its Mount Albert campus, including the southern carpark, to the Ministry of Housing and Urban Development (MHUD), to pay off Crown debts. He said Unitec had sold blocks of land to MHUD over a number of years which was being used to develop new housing.

[24] Unitec did not have much leverage over the sale of parts of its Mount Albert campus because MHUD had authority to acquire the land under the Public Works Act 1981 and if Unitec did not agree to the sale, MHUD would exercise its authority to acquire the land.

[25] Dr Loo said that free car parking was not always guaranteed but he had never had a problem accessing the free parking spaces. He was aware that sometimes staff members had to drive around the Unitec campus site if they could not find a free carparking space. This became more of a problem when more land was sold.

[26] Ms Watene said that she had always been able to access a free carparking space, though sometimes she was unable to access one close to the building she was working in and would therefore have to walk. As land was sold, accessing a free car park space meant arriving earlier and walking further.

[27] When asked about the 'first come, first served' reference, she agreed she was aware of it, but commented that it was not a problem if a staff member arrived at work early and was prepared to walk.

[28] When questioned, it was accepted that some employees may not have been able to park free of charge when they arrived later on a busy day.

[29] Mr Gilmore said Unitec explored leasing back some of the land in extensive negotiations with MHUD and was successful in securing 500 carparking spaces for a period of three to five years.

[30] Mr Gilmore said that despite the leasing arrangement, as a result of the sale the number of car parking spaces available was expected to decrease from 1,608 in 2019 to 1,213 in 2022. This was approximately a 25% decrease in carparking spaces. It was believed that one of the ways to manage the reduction and use the limited space more efficiently was to charge the staff and students a small fee for carparking.

#### *The Consultation process*

[31] Dr Loo said that on 19 July 2022 Te Pūkenga sent a letter to all employees with a proposal to change the carparking rights of staff. The letter stated:

As our Mt Albert campus has become more condensed, the number of carparks has reduced, so we have developed a proposal for our car parking and invite your feedback on that plan. ...

Over the past few years, as we consolidated out Mt Albert campus and paid off our debts, we've sold blocks of Unitec land to the Government, via the Ministry of Housing and Urban Development (MHUD).

Unfortunately, one of the impacts of our smaller campus is a decrease in the number of carparks available to staff, ākongā and visitors at Unitec. In total there will be a decrease of almost 400 carparks by November 2022 when we will no longer have use of the Southern Carpark.

[32] The letter proposed options including making all parking available to staff and students, and introducing payment on all parking spaces. Feedback on the proposals was required by 5 August 2022. The proposal was also published in the Unitec newsletter dated 20 July 2022.

[33] Dr Loo said that the staff held a hui with the Unitec management on 18 August 2022 which was lead by the TEU Unitec Branch Organiser. At the meeting staff expressed “outrage” over the proposed parking charges and the feedback indicated that 99 percent of the staff opposed charging for parking.

[34] Mr Gilmore said that the feedback to the proposal raised staff concerns about the rising cost of living and the upcoming consolidation of all ITOs and ITPs to which the proposed change was contributing.

[35] Complaints were also raised about the lack of alternatives given the inadequate public transport options in Auckland.

[36] Mr Gilmore said that just prior to the carparking proposal Unitec had increased salaries for those members of staff on individual employment agreements and were in the process of negotiating with the unions for those staff members covered by a collective agreement.

[37] It had been conveyed to the staff that there was a flexible working policy in place so staff could work from home rather than having to drive to work each day. Unitec was also examining making showering and changing facilities available for staff who chose to cycle to work.

[38] Dr Loo said that flexible working was not an option for the academic staff who were required to be available on campus during teaching hours when the students were present on campus.

[39] Mr Gilmore said it had also been made clear during the consultation process that the rationale behind the proposal was not revenue generation and that any profit made from the parking fees would be invested back to Unitec and used to upgrade and improve facilities.

[40] After researching what other public and private organisations were doing, he reached the view that Unitec’s proposed price for paid parking was relatively low, and that paid carparking was used by many organisations to reduce their staff and/or customer car usage. He shared these research findings with Dr Loo and the TEU during the consultation process.

[41] Dr Loo said that on 30 August 2022 an email was sent to all staff containing the details of the decision which had been made, which reflected amendments made after consultation.

[42] The letter confirmed that staff members would be able to continue using the free carparking in the southern carpark for at least two months until MHUD required the land to be returned to it, expected to be October 2022.

[43] All other carparking spaces at the Mount Albert campus required payment, however payment would only be required between 8.00 a.m. and 4.00 p.m. Monday to Friday, and would therefore be free in the evenings and at weekends.

[44] Except for the limited spaces on the southern carpark, students and staff were required to pay a maximum of \$3.00 per day (or \$1.00 per hour) for the carpark space. For those students and staff on the Waitākere campus the parking rate was increased to \$4.00 per day.

[45] The changes were to take effect on 1 February 2023.

[46] On 16 February 2023 a reminder email was sent advising that the commencement date for the change had been moved to 27 February 2023. It also advised that Unitec would not be charging for parking during the weekends and semester breaks. Further that the daily rate for parking would be \$3.00 a day at both the Mount Albert and the Waitākere campuses.

[47] Mr Gilmore said that after the decision was confirmed, carparking user groups were formed and engaged in the process of operationalising the carparking plan.

#### *Free Life insurance and Income Protection Insurances*

[48] Mr Lotu-Liga, Executive Director Region One of Te Pūkenga, said that prior to 1 October 2022 Unitec was a separate legal entity. However, after that date Unitec was dissolved into Te Pūkenga together with all the other ITO's and ITP's in New Zealand. As a result it ceased to exist as a separate legal entity and operated as a business unit of Te Pūkenga.

[49] Prior to 1 October 2022 Unitec staff employees were eligible to join life and income protection insurance policies (the insurance policies) which were arranged by Unitec. Unitec also covered the cost of these.

[50] There was no clause in the individual employment agreements or the collective agreement covering the provision of the insurance policies, however letters of offer provided in evidence referred to the policies stating: "I have also enclosed details about the Unitec Superannuation and Insurance Plans. For further information ...."

[51] Dr Loo said that he had regarded the insurance policies as an incentive to join Unitec.

[52] The Staff Welcome pack referred to the insurance policies stating:

**Unitec Workplace Insurance Plan**

Permanent staff who are employed at 0.5 FTE or greater are eligible for the member benefits of the Unitec Workplace Insurance plan. The plan includes life insurance and income protection.

[53] Ms Adlam, Regional Well-being and Safety Lead-Region One of Te Pūkenga, said that eligible employees received a flyer from the insurer broker Mercer Marsh intitled 'Employee Guide' each year which described the "valuable benefits provided", provided a summary of the policy, and any changes to the insurance benefits and premium costs. It included the following information:

**Cessation of cover**

Your insurance cover under the policy will cease on the earliest of the following:

- ....
- Cancellation of this policy by the insurer(s) or Unitec.

**Terms & Conditions**

The terms and conditions of the applicable insurance policy with Fidelity Life and AIA will ultimately prevail at all times. The insurer and/or policies may change from time to time as determined by the policy owner, Unitec.

[54] The cancellation of the policy notification in the Employee Guide reflected what was written into each policy contract. The Sovereign Essential Group Income Protection Policy (defined in the policy as the Company) stated in clause 15.2:

...the Company may terminate this Policy for any reason at the end of a Policy Year by giving three months' prior notice in writing to the Policy Owner.

[55] The Fidelity Group Insurance Policy document stated at clause 25.1:

We may cancel this policy by giving the policy owner three months' notice in writing with the cancellation effective at the review date.

[56] Dr Loo said he recalled seeing the Employee Guide but did not consider the cancellation clause.

[57] Mr Chand said although he received the Employee Guide every year, he did not consider the cancellation clause because the insurance policies had been in place a long time and there had been no change during that time.

[58] Ms Watene said she did not read the cancellation clause, she only read the benefits provided under the policies which she had in place for 29 years.

[59] Ms Adlam said that she regarded the provision of the insurance policies as a benefit which could be removed at any time because this was stated in the Employee Guide.

[60] As part of the amalgamation process Ms Adlam said Unitec contacted all of its suppliers, including the insurance policies insurers, to inform them of the change. A letter dated 15 September 2022 was sent to the insurers and the insurance broker Mercer Marsh advising them that: “from 1 October 2022, Unitec New Zealand Limited will no longer be a separate legal entity. Instead, it will become a business division of its parent entity, Te Pūkenga ...”.

[61] Ms Adlam said that the then Deputy Chief Executive of People and Culture responded to questions posed by the insurers via Mercer Marsh about the coverage of the insurance policies. She said it appeared that the name of the policy owner was changed at the request of the insurers from ‘Unitec’ to ‘Te Pūkenga trading as Unitec’. However, this was a temporary change possible whilst Unitec could be identified as a business unit of Te Pūkenga.

[62] On 4 October 2022 Deputy Chief Executive of People and Culture emailed some members of the People and Culture team. In the email she explained that the insurers had concerns about the coverage when it had been revealed that once the Unitec business unit within Te Pūkenga was dissolved and fully incorporated into Te Pūkenga, Unitec and/or the insurers might not be able to continue the existing policies. Therefore, there was an urgent need for them to review the situation.

[63] Ms Adlam said she was involved in the meetings which took place with Mercer Marsh on 5 October and 2 November 2022. A broker from Mercer Marsh communicated with the insurers on Unitec’s behalf.

[64] On 9 October 2022 Deputy Chief Executive of People and Culture emailed Mercer Marsh asking about the implications once Unitec was dissolved and all the Unitec employees transitioned to new contracts with Te Pūkenga. She enquired what the options might be, especially if the existing employees could continue to be covered via a type of named schedule.

[65] On 23 November 2022 Ms Adlam said the broker reported to Unitec that the insurers had some concerns about the transition. They had raised concerns upon realising that once Unitec fully transitioned into Te Pūkenga, it would cease to exist as a separate entity. As a consequence, it might no longer meet the plan eligibility terms. There was therefore an urgent need to review the situation.

[66] Ms Adlam explained that the basis of the concern had been that the policy owner of the existing insurance policies was Unitec as the employer of Unitec’s employees. The terms and

conditions of the policies were specifically designed for Unitec and its employees and were endorsed by the insurers accordingly.

[67] On 1 October 2022 Unitec would no longer exist as a separate legal entity. From that date Te Pūkenga became the employer of all the Unitec employees. In addition, it became the employer of all the other hundreds of employees in the other 18 ITPs and 9 ITOs.

[68] Significantly Ms Adlam said, this meant that once Unitec fully transitioned into Te Pūkenga, the insurers would be able to terminate the existing insurance policies.

[69] Ms Adlam said options explored included whether or not the existing Unitec employees could be ringfenced within Te Pūkenga, however this would not resolve the issue because once the transition process was completed the employees would no longer be “Unitec” employees as defined under the policies, and it would become difficult, if not impossible, to differentiate Unitec employees from the rest of Te Pūkenga’s employees.

[70] In addition, if the policies were ringfenced for existing Unitec employees without new employees being added to the plan, the average age within that group would naturally increase over time. This would significantly increase the costs associated with the policies for the new policy owner which would be Te Pūkenga after the transition.

[71] Finally, if Te Pūkenga grandparented the policies and continued those as the policy owner, this also meant that Te Pūkenga would need to provide the same terms and conditions of the policies to all of its employees, not merely those transitioning from Unitec.

[72] Ms Adlam said these options were presented to Unitec’s then executive team. Included were recommendations on the options:

- **Cease eligibility for new employees joining Unitec from 1 January 2023**
  - Recommended with steps already underway as a measure of good faith, advising the restriction to coverage (offering the benefit in the knowledge it may be withdrawn in 90 days does not feel appropriate)
- **Cancel the policies by 31 March 2023**
  - Recommended – this would allow suitable time for consultation with employees, plus 9- months of budget savings (\$335,000)/thus reducing the need budget savings through headcount reductions
- **Consult on withdrawing the policies effective 31 March 2023**
  - Recommended, this allows Unitec time to provide 90-days *indicative* notice to Mercer Marsh for the insurers and sufficient time to consult with employees on the plan’s withdrawals.

[73] Mr Lotu-Liga said during the transition process he was employed by Te Pūkenga as Executive Director of the MIT and Unitec business divisions. He was part of the executive

leadership team (ELT) that had to consider how much the policies could potentially cost Te Pūkenga, should the insurance policy cover continue to be provided to Unitec employees.

[74] The issue was raised with Te Pūkenga which made it clear that the alternative options, namely ringfencing the policies for existing Unitec employees only or providing them to all the Te Pūkenga employees, were not either practically or financially feasible.

[75] Mr Lotu-Liga said that in November 2022 the then Chief Executive of Te Pūkenga reminded the ELT of the budget constraints and that there was a need to operate within their means in 2023. Te Pūkenga did not have the budget to be able to offer the same insurance policies to all of its employees. Retaining the policies to the existing group of Unitec employees would be an increasing financial burden. As a result neither option seemed viable.

[76] Mr Lotu-Liga said that it seemed sensible in the circumstances to commence the consultation process as soon as possible before the insurers could decide to cancel the policies at their discretion. This meant that Unitec would have more leverage in terms of negotiating the termination of the existing policies.

[77] Mr Lotu-Liga said he believed Unitec was able to withdraw the benefit because it was a staff perk, not a contractual benefit. The documents detailing the terms of the policies specified they could be amended or withdrawn at any time by Unitec and/or the insurers. As a result he believed the employees were aware that the benefits were discretionary in nature.

#### *The Consultation Process*

[78] On 19 January 2023 Mr Lotu-Liga said he started the consultation process, which he led as Executive Director, by emailing all staff on 19 January 2023 proposing the withdrawal of the income protection and life insurance benefits.

[79] In the email he explained the background to the proposal as entailed by the transition to Te Pūkenga, and that Unitec was considering withdrawing the benefits: “Effective from 31 March 2023, Unitec’s Income Protection and Life Insurance plans will no longer continue”. The employees were advised they had three weeks to 10 February 2023 to provide feedback.

[80] Mr Lotu-Liga said that it was anticipated to be a sensitive issue and a lot of engagement and feedback was received from concerned employees. This included:

- That the policies were a contractual entitlement which could not be withdrawn without the affected employee’s consent;
- Questioning whether Unitec had genuinely tried to retain the insurance benefits or explore alternative options;

- Suggestions for alternative solutions, such as employees contributing to retaining the cover or Unitec increasing employees' salaries to compensate for the loss of benefit.

[81] In light of the extensive consultation Mr Lotu-Liga said it was decided to extend the consultation period and explore further alternative options with the insurance providers. As a result of an approach, the insurers offered to extend the grace period before the cessation of the group plan.

[82] Unitec then proposed some changes to the original proposal in that, rather than withdrawing the insurance policies entirely from 31 March 2023, they would be extended until 4 May 2023. In addition, the covered employees would have 60 days from the date of cessation of the group policies enter into individual insurance policies without the need to undergo a medical assessment.

[83] On 9 March 2023 the employees were emailed outlining Unitec's responses to the initial feedback and asking for any further feedback on the amended proposal by 16 March 2023.

[84] Mr Lotu-Liga said the further feedback was consistent with the initial feedback provided.

[85] On 5 April 2023 Unitec decided to proceed with the proposal and terminate the staff insurance policies. The decision was confirmed in an email which also advised that the withdrawal date had been extended to 4 May 2023 and that there was the option available to continue either of the policies without the need for a comprehensive medical assessment if taken up within 60 days of the group cover ceasing.

[86] In addition, Unitec also arranged for onsite meetings with the insurers and the brokers to discuss the alternative options available to them.

### **Terms and Conditions of Employment and Benefits**

[87] It is settled law that terms and conditions of employment are wider than the terms which are written in an employment agreement. They comprise all the rights, benefits and obligations arising out of the employment relationship.<sup>1</sup>

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<sup>1</sup> *Trans Rail Ltd v Rail and Maritime Transport Union (Inc)* (1999) 1 ERNZ 460 at [26]

[88] It does not follow however that everything the employer provides, or an employee expects to receive during employment is either a term or a condition of employment between the two<sup>2</sup>

[89] The Court of Appeal in *Metropolitan Glass and Glazing Ltd v Labour Inspector, Ministry of Business and Innovation and Employment* clarified that discretionary employment benefits can exist outside of the terms and conditions of employment. However even if they do fall within the employment agreement, the employer is able to reserve its discretion to modify or withdraw such employment benefits without seeking the employees' consent to do so.<sup>3</sup>

**Was free carparking a term and condition of employment which Te Pūkenga could not lawfully remove?**

[90] I find that the access for free carparking was not an express term of employment. There was no entitlement to free carparking in the Unitec employees' individual employment agreements or in the Collective Agreement.

[91] Rather it was a benefit which was referred to in job advertisements, was mentioned at interviews, referenced in the Staff A-Z document and the "Benefits Available to Unitec Employees" document.

[92] The evidence establishes that only the Unitec Mount Albert campus employees had access to free carparking, and that this was a benefit which had been enjoyed for many years by longer serving employees. However, those employees based at the Waitākere campus had to pay a carparking fee, so it was not a benefit which applied to all Unitec employees.

*A benefit implied into the employment agreements?*

[93] Benefits can be implied into an employment agreement by custom and practice provided that they meet the legal criterion, namely notoriety, certainty, reasonableness, proof and consistency with the express terms of the contract.

(i) *Notoriety*

[94] Free carparking had been available at the Mount Albert campus for many years. However, the staff A-Z document stated that free staff parking was available at the Mount Albert campus on a "first come, first served" basis.

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<sup>2</sup> *ANZ National Bank Ltd v Doidge* [2005] EmpC 518 at [46]

<sup>3</sup> *Metropolitan Glass and Glazing Ltd v Labour Inspector, Ministry of Business, and Innovation and Employment* [2021] NZCA 560

[95] Dr Loo's evidence confirmed that the free carparking was not guaranteed, and Ms Watene's evidence was that, provided she arrived early, she "almost always" got a free carparking space, which implies that there was no guarantee if an employee arrived later in the working day.

[96] In addition, after the land available for parking reduced in size, the evidence from Ms Watene and Mr Chand was that although they had always been able to access a free carparking space, this sometimes involved spending some time searching for a free carparking space and a walk to their place of work.

[97] The free carparking was therefore subject to a caveat, it was available if an employee could find a space. No guarantee was provided that one would always be available.

[98] If unable to find a free carparking space, employees would have to pay for a carparking space or find free carparking offsite. Employees had to display a valid carparking voucher, failure to do so was a contravention of the Unitec Traffic Safety and Parking Policy which provided that parking fees were determined by the Council or Commissioner.

[99] Whilst the free carparking was well known and therefore had some notoriety, I find it was not guaranteed and was subject to the caveat of availability stated in the staff A-Z document.

(ii) *Certainty*

[100] To be implied the term must have uniform usage with certainty.

[101] The evidence did not establish that there was certainty over the number of free carparking spaces which were available. Over a period of time the land available to allow for such parking had reduced due to MHUD acquiring it for housing development.

[102] Further Unitec was able to make the changes to the spaces available for free carparking without seeking the employees' consent.

[103] The free carparking was moreover limited to those Unitec employees based at the Mount Albert campus because it had land available, so there was no certainty because no consistency of usage for all Unitec employees.

(iii) *Reasonableness*

[104] Unitec had no power to refuse the land when MHUD exercised its right of acquisition and its authority under the Public Works Act. This induced the proposal to introduce paid parking due to the reduction in the land available for free carparking.

[105] I find it would be unreasonable in the circumstances to expect Unitec to continue providing free carparking to its Mount Albert based employees when the land acquisition and reduction had occurred, and was going to be an ongoing process.

[106] In those circumstances I find it would not reasonable to expect Unitec to continue to provide the free carparking spaces in the same number as previously.

(iv) *Proof*

[107] The feedback from employees during the consultation process was that some did not regard the free carparking as a contractual entitlement, describing it as a “perk”.

[108] Mr Chand, Ms Watene and Dr Loo’s evidence was that sometimes it was difficult to find a free carparking space on busy days, although arriving early alleviated that situation. When questioned it was conceded that some employees might not have been able to find a free carparking space on such busy days.

[109] In those circumstances, I am unable to find there was proof about a shared belief that free carparking was part of the Unitec employees terms and conditions of employment.

(v) *Consistency with the express terms of the contract.*

[110] It is accepted that free carparking at the Mount Albert campus had been a feature of employment at that location for many years. It was mentioned in job advertisements, in job interviews and mentioned in the staff A-Z document. However, the free carparking had never been incorporated into the individual employment agreements or the collective agreement at any stage.

[111] I find this infers a recognition that it was discretionary. Accordingly implying free carparking into a term of the employment agreement would appear to be inconsistent with the express terms of the contract.

[112] Considering the issue as a whole, although I find there was a degree of notoriety about free carparking in that it was well-known to the Unitec employees based at Mount Albert, there was also a recognition that it was not guaranteed and was regarded by some employees as a ‘perk’.

[113] The ability to park free had been limited over the years as the physical fingerprint of the land available for parking reduced due to the sale of land to MHUD, a process Unitec was unable to stop because MHUD had the authority to do so, and Unitec did not have to, and did not in fact, consult with the employees about the sale.

[114] The benefit of free carparking was not consistent across Unitec, it was not available to all Unitec employees, those based at the Waitākere campus had to pay to park their cars.

[115] I find that the free carparking was a discretionary benefit not an express term of employment. Therefore, whilst Unitec, and on transfer Te Pūkenga, had the right to propose its removal there had to be a fair and reasonable consultation process first.

[116] The letter dated 19 July 2022 proposed changes in parking, There was a hui held between management and employees on 18 August 2022. This was before the employees received the letter offering them the opportunity to transfer to Te Pūkenga.

[117] During the consultation process Unitec:

- a) presented the proposal to the employees and invited their feedback, allowing an extension to the date when feedback had to be provided;
- b) provided all relevant information on the rationale behind the proposal in the letter dated 19 July 2022; and
- c) Mr Gilmore's evidence was that Unitec considered all the feedback with an open mind and made changes to the initial proposal as a result.

[118] In addition, I note that Unitec tried to minimize the impact of the proposal on its employees by negotiating with MHUD to secure additional parking for 500 spaces for some years.

[119] During the consultation process Mr Gilmore was open in his engagement with the employees, sharing his research information with Dr Loo and the TEU, and attending the hui on 18 August 2022.

[120] I find that Unitec carried out a fair and reasonable consultation process.

[121] I determine that Te Pūkenga could lawfully remove free carparking.

**Were the provision of the Life Insurance and Income Protection terms and conditions of employment which Te Pūkenga could not lawfully remove?**

[122] The insurance policies were offered to all Unitec employees and had been offered for at least 30 years. It was mentioned in employees' offer letters. Those employees who took

advantage of the policies received an annual Employee Guide from Mercer Marsh which contained a summary of the cover provided, and any changes to it.

[123] The Employee Guide described the insurance policies as “valuable benefits provided to you by Unitec”. It also contained the cancellation details. Although the Employee Guide contained information on the cancellation of the policy by either Unitec or the insurer (following which the policy cover would cease), the information was also contained in each insurers’ policies.

[124] The letter from Te Pūkenga on 29 August 2022 offered employees the opportunity to transfer on existing terms and conditions of employment. It is submitted by the Applicants that the operation of Schedule 14 of the Education and Training Act 2020 and the 29 August 2022 transfer agreement conferred the employment terms and conditions which were to apply from 1 October 2022, this included the benefit of the insurance policies.

[125] It is submitted for the Respondent that the insurance policies were never an express term and condition of the individual employment agreements, nor are they implied by custom and practice.

*Implied by Custom and Practice?*

*(i) Notoriety*

[126] The Respondent submits that the staff insurance policies had not acquired such notoriety that the parties should be taken to have known of them and intended they should be part of their contract.

[127] The insurance policies were included in some employee offer letters, were referred to in the Staff Welcome pack and the employees covered by the policies received an annual letter from Mercer Marsh.

[128] The annual letters contained a notification that either the policy owner (Unitec) or the insurers could cancel or amend the policies. The insurers could do so by giving written notice to Unitec. The cancellation clause was also set out in the policy documents.

[129] The evidence of Mr Chand and Ms Watene was that they did not consider the cancellation clause because the policies had been in place for a long time without any change.

[130] The fact that they chose not to regard a term of the policy does not prevent that term being activated. Nor does the fact that two employees did not have regard to the cancellation advice indicate that other employees covered by the insurance policies were not aware of it.

(ii) *Certainty*

[131] To be implied there must be uniform usage with certainty about the terms.

[132] In common with most insurance policies, the policies had been carefully drafted by the insurers.

[133] Cancellation had not occurred during the years the policies had been in place, and this may have given the covered employees confidence that it would not occur in the future. I find however this does not negate the insurers right of cancellation which was detailed in each policy and contained on the Employee Guide. Therefore, the caveat had been promulgated to the employees and there was certainty about it also.

(iv) *Reasonableness*

[134] The evidence of Dr Loo, Mr Chand and Ms Watene was that they regarded the insurance policies as an incentive to work at Unitec. It is accepted by Unitec that providing access to the insurance policies could be considered a reasonable measure to recruit and retain employees.

[135] It is submitted by the Respondent that it was unreasonable for the employees to expect Unitec, or Te Pūkenga, to continue to offer the insurance policies indefinitely in light of the changing and increasing financial costs of doing so.

[136] Moreover, it would be impossible and therefore unreasonable to expect Unitec to continue to offer them if the insurers exercised their right of cancellation.

[137] It is further submitted that continuing the policies if the insurers chose to cancel them was not possible for Unitec, and the insurers had indicated concern once the transition to Te Pūkenga occurred.

[138] I find that in circumstances in which the insurers chose to exercise their right of cancellation, a unilateral act, it would be unreasonable to expect Unitec to continue to offer the insurance policies to employees due to impossibility.

[139] In addition, there was a potential and significant cost to Te Pūkenga of continuing the policies by ringfencing or continuing the insurance policies. This was due to either:

- (i) The cost of covering a smaller but aging group of Unitec employees without new employees joining the scheme; or
- (ii) Extending the insurance policies to all Te Pūkenga employees.

[140] In light of its limited budget constrictions, neither option was acceptable to Te Pūkenga.

(v) *Proof*

[141] Whilst Dr Loo, Mr Chand and Ms Watene considered the provision of the insurance policies in the nature of a contractual term of their employment, they had been notified of the cancellation rights even if they had not regarded them.

[142] Ms Adlam's evidence was that she had known of the cancellation clause from the annual letters and from the policy documents. On that basis, her evidence was that she had not expected it to continue indefinitely.

[143] It is unclear how other Unitec employees regarded the insurance terms, whether as a contractual term or a discretionary benefit.

(v) *Consistency with express terms*

[144] The individual employment agreements and the Collective Agreement do not require Unitec to provide the insurance policies. They are referred to in offer letters and in the Staff welcome pack.

[145] The insurance policies are binding on Unitec and the insurers and state that either party could cancel them or amend them. If the insurers chose to do so, Unitec would be unable to continue to offer the insurance policies.

[146] It is submitted for the Respondent that implying the provision into the employment agreements thereby requiring Unitec to continue the policies indefinitely would be inconsistent with the express terms of the insurance policies.

*Did the employees have a reasonable expectation of continued cover?*

[147] The policies had been in place for many years, and the employees who had taken up the benefit had expected them to continue indefinitely and they presented a considerable financial benefit.

[148] Whether or not there was an expectation that they would continue indefinitely, and this was a reasonable expectation, has to be considered against the fact that the employees were notified annually of the fact that either Unitec or the insurer could cancel (or amend) them.. Particularly in light of financial implications that might impact on the ongoing viability of the policies.

[149] The evidence was that after the insurers were advised that Unitec would become part of Te Pūkenga on 1 October 2022 they raised questions about the implications. Following that there was discussion between Unitec and the insurers via the insurance broker Mercer Marsh.

[150] I find that Unitec was active in examining alternative options such as continuing to cover existing employees through a named schedule, however it was the insurers who raised their concern that once the transition was completed, Unitec would cease to meet the policy eligibility requirements.

[151] The other options considered included ‘ringfencing’ the existing employees who were covered, but this would become too expensive without new employees being added to the cover. Grandparenting the benefit would also be expensive because it would mean providing the benefit to all Te Pūkenga employees. Increasingly over time it would be difficult to differentiate employees who may have commenced employment at Unitec but moved to, or performed work in, other ITOs or ITPs.

[152] In line with the Employment Court’s decision in *Cuttriss v Carter Holt Harvey Ltd* I find that although the insurance policies presented a substantial financial benefit to the employees, and had been in place many years, the employees were notified on an annual basis, in addition to the statement in the policies, that they could be cancelled or amended at any time.<sup>4</sup>

[153] On that basis I do not consider that they could have a reasonable expectation that it would continue indefinitely particularly given increasing and prohibitive cost of continuing the policies cover.

[154] Having considered all the circumstances, I find that the insurance policies were discretionary benefits not an express term of employment. I do not find that they had been implied into term and condition of employment having assessed them as a benefit against the legal criteria for an implication.

[155] They were a benefit which was covered by the letter dated 29 August 2022 which offered a transfer of employment to Te Pūkenga. Therefore, when the transfer occurred Te Pūkenga had responsibility for ensuring a fair and reasonable consultation process before the removal of the benefit.

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<sup>4</sup> *Cuttriss v Carter Holt Harvey Ltd* [2007] NZNZ 233

*The Consultation Process*

[156] Mr Lotu-Liga was responsible for overseeing the consultation process, Similarly to the consultation on carparking, there was an initial reasonable period provided for feedback (three weeks), this was subsequently extended.

[157] It was incumbent on Te Pūkenga that it had an open mind, considered and investigated then responded to the feedback. The feedback was outlined and responded to in the Update on Insurance Benefit Consultation document dated 9 March 2023.

[158] Amendments were made to the proposal after employee feedback and discussion with the insurers which included (i) extending the policies to 4 May 2023; and (ii) allowing a period of 60 days from the cessation of the group insurance policies to allow interested employees to take up individual plans without the requirement for a medical assessment.

[159] I find that the consultation was full, fair and reasonable.

[160] I determine that Te Pūkenga could lawfully remove the provision of the Life Insurance and Income Protection.

**Costs**

[161] In matters concerning a dispute over the application, interpretation or operation of terms of a collective agreement, the Authority generally applies a presumption that parties will bear their own costs.<sup>5</sup>

[162] Should either party consider the presumption should not apply, a memorandum to that effect should be lodged and served within 28 days.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>5</sup> See "Costs in the Authority", Practice Direction of the Employment Relations Authority, p 5